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1 RECORD OF ORAL HEARING
2 UNITED STATES PATENT AND TRADEMARK OFFICE
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4
5 BEFORE THE BOARD OF PATENT APPEALS
6 AND INTERFERENCES
7 _____

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9 *Ex parte* JAMES A. MACOVE
10 _____

11
12 Appeal 2009-009633
13 Application 10/750,244
14 Technology Center 3700
15 _____

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17 Oral Hearing Held: Tuesday, February 8, 2011
18 _____

19
20 Before JENNIFER D. BAHR, JOHN C. KERINS and
21 KEN B. BARRETT, *Administrative Patent Judges*.
22

23 ON BEHALF OF THE APPELLANT:

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1 *The above-entitled matter came on for hearing on Tuesday,*
2 *February 8, 2011, commencing at 9:20 a.m., at the U.S. Patent and*
3 *Trademark Office, 600 Dulany Street, 9th Floor, Alexandria, Virginia,*
4 *before Kevin E. Carr, Notary Public.*

5
6 THE CLERK: Good morning. Calendar No. 21, Appeal No.
7 2009-9633. Mr. Cahill.

8 MR. CAHILL: I was hoping to hand a few things out. I have a
9 couple of tear sheets with figures on them. And I hoped you would take a
10 look at a razor, helps to visualize what it is that we're talking about.

11 So we have two arguments. We have a tear sheet for each one
12 of the figures --

13 JUDGE BAHR: Begin whenever you're ready, Mr. Cahill.

14 MR. CAHILL: Okay. Now I have my own razor as well.

15 Now I see you all have the briefs open in front of you, so I'm
16 sure you're grounded in what we're talking about here.

17 It's a razor having a broad shaving plane, with multiple razor
18 blades on it. And then on a top back surface, you apply a trim razor blade
19 grip.

20 And that grip preferably has one blade. It has a thin blade
21 guard, and it's used for trimming for getting into difficult-to-reach areas, and
22 for trimming sideburns and other things you might like to use the trim blade
23 for.

24 Now Mr. Macove has done a lot of prior art searching in this
25 area, and we've cited a lot of art to the Examiner. The Examiner has
26 obviously done his own search, and the only reference any of us can find
27 that puts a trim blade on the back of the razor is the Rozenkranc reference.

28 We can't find anything else that puts a trim blade back there, at
29 least nothing that has a priority date before Mr. Macove.

30 So that is the prior art.

31 So I'd like to start with the language around the thin blade
32 guard. I think the angles between the working blades are pretty well fleshed

1 out in the brief; but I think the thin blade guard could use a little bit more
2 discussion.

3 So Rozenkranc -- and the figure I like is on the bottom of that
4 tear sheet -- provides a trim blade that has a guard in front of it. And you
5 can see that I've put the line there, with some arrows on it, that show the
6 leading edge of the blade guard, the trailing edge of the blade group, and
7 where the blade is located within that blade group.

8 And the blade is roughly in the middle. It's a little bit behind
9 the middle. Now Mr. Macove identified that as a problem with trim-blade
10 shaving.

11 There is some language on page six of the appeal brief that
12 quotes from the background of the invention, that talks about putting an
13 engaging strip to grab hair on the front of a blade group.

14 And that's exactly what Mr. Rozenkranc did. And what that
15 does is, it pushes the blade back. And it makes it harder to shave in confined
16 areas.

17 So what Rozenkranc realized was, if you want to shave in a
18 confined area, and you have your broad razor group, and you try to put it in
19 there, it doesn't go. You can't shave in there.

20 So what he did was he put a trim blade back here. But he put it
21 in the middle of this surface. And so when you try to get in there, you still
22 have a problem.

23 So Mr. Macove's solution was to have a leading-edge blade
24 guard, with a thin profile, to allow a distance between the at-least one razor
25 blade and the individual's skin to be optimally minimized, to facilitate
26 shaving in confined hard-to-reach areas of the individual's skin.

27 So what that does it, on this narrower surface, now, you have a
28 thin blade guard, so that the blade is close to the front. Now it's close to the
29 skin.

30 JUDGE KERINS: Counsel, just on that point, I'm not even sure
31 it affects how this case will be decided, but isn't the trailing end the one that

1 should be thin to get into a confined area? The blade should be closer to the
2 back?

3 MR. CAHILL: If the blade is closer to the front, and you want
4 to shave in a confined area like this one, say under your nostrils, now you
5 can shave like this. And it works.

6 If it's in the middle, that doesn't work. But if it's in the front, it
7 works. And you can see that in the razor that I've handed out.

8 It's got a thin blade guard, with the blade close to that front
9 edge, and you can imagine how you could put this up under your nostril, and
10 would be able to shave very effectively with it.

11 JUDGE KERINS: I actually can't imagine doing that on the
12 sample that you've handed us, because that would put the handle in my
13 mouth.

14 But there you've got the trailing end is the part that's --

15 MR. CAHILL: No, the leading edge goes under the nostril and
16 down. And that's the way it works. Millions of these razors have been sold.

17 JUDGE KERINS: I own one.

18 MR. CAHILL: Okay. I'm confident that it works.

19 But that comes from putting it on the front edge. You use the
20 front edge to shave, and --

21 JUDGE KERINS: Well, in any event, let's move on to why the
22 Examiner's position is unreasonable about the leading edge of the blade
23 guard in Rozenkranc.

24 MR. CAHILL: Okay.

25 The Examiner's interpretation of the blade guard in Rozenkranc,
26 I believe, is incorrect. He points to one small portion of the razor and says
27 "This is the blade guard, and it's thin."

28 All right. He points to just that front edge up here that pulls the
29 hair, and he says that that's the blade guard.

30 Now what he doesn't say, and what Rozenkranc doesn't say, but
31 what I think he's getting at is: There's a line here that you see in the

1 cross-section. And I think the Examiner's view is that behind that line is all
2 open space, of a cross-section that's opened.

3 And so only this portion at the very leading tip is actually a
4 blade guard.

5 I'm not sure that interpretation of the drawing is correct or not.
6 It might be. Rozenkranc doesn't say; he only has twelve lines of detailed
7 description. But it can't be that only this selected part of the razor is the
8 blade guard.

9 The blade guard is whatever guards the blade. It's what comes
10 in front of it, and prevents the user from digging the blade into their skin.

11 So even if the Examiner is correct, there has to be something
12 that holds this blade guard out here. In other words, even if the Examiner is
13 exactly correct, then the blade guard must be U-shaped, must go like this.

14 So the blade guard actually causes this big separation between
15 the leading edge and the blade. And so it is not thin, it takes up more than
16 half the space of the razor head.

17 JUDGE KERINS: Counsel, why would it be unreasonable to
18 view Rozenkranc as having a leading-edge blade guard, which is that portion
19 shown in cross-section, and two side rails? And the two side rails are not
20 part of the leading-edge blade guard?

21 MR. CAHILL: Well, I believe that they are part of the
22 leading-edge blade guard. I mean, that's like saying you have a football
23 helmet with a face mask on it. The face mask is separated from the user's
24 face the same way this blade guard would be separated from the blade.

25 And I don't think you'd say that the portion of the face mask
26 that connects to the helmet is not a face mask. It is.

27 And the spacing that it creates between the front of the mask
28 and the wearer's face is vitally important. And it is part of the face mask.

29 In the same way here, the portion that the Examiner has
30 identified as the blade guard, it does need to be spaced from the razor,
31 otherwise the razor's not going to be able to cut hair, and it's also not going
32 to be able to be rinsed;

1 But the portion of the blade guard that holds it there, that's part
2 of the blade guard. It's not --

3 JUDGE KERINS: So the entire cartridge is basically the blade
4 guard?

5 MR. CAHILL: The portion that's in front of the blade.

6 JUDGE KERINS: Is it your position that that portion that the
7 Examiner is referring to as a blade guard does nothing to guard the face
8 against the blade?

9 MR. CAHILL: Oh, it does do something to guard, but it isn't
10 the entire blade guard. It's a portion of the blade guard.

11 JUDGE KERINS: The leading-edge blade guard.

12 MR. CAHILL: It's a portion of the leading-edge blade guard.
13 It's a portion of it. It's not all of it.

14 And there is more claim language to be considered. All right:

15 "The leading-edge blade guard having a thin profile, to allow a
16 distance between the at-least one razor blade and an individual's skin to be
17 optimally minimized to facilitate shaving in confined, hard-to-reach areas of
18 the individual's skin."

19 Rozenkranc does not have a blade guard that does that. All
20 right. Rozenkranc's blade guard pushes the blade back to the middle of the
21 cartridge, exactly where Mr. Macove tells you it shouldn't be.

22 Now the second of the Examiner's arguments in this regard is
23 mostly that thin doesn't mean anything. First, he tell us that Rozenkranc has
24 a thin blade guard, and then he tells us that thin doesn't mean anything.

25 Because if we consider an elephant to be a big animal, but then
26 we see a blue whale, now do we still think the elephant is a big animal?

27 I think the answer to that is yes.

28 Once the reference frame is set as a person looking at the class
29 of animals, then we know what big is. And the case law tells us that we can
30 understand these types of comparative terms by the function that the
31 structural element performs.

1 And here, the function's written right into the claim. The
2 purpose of making a thin blade guard is to move the blade closer to the skin,
3 to make it easier to shave in confined areas.

4 And so we think thin has meaning here, that thin is in the
5 context of the blade group, that it allows the blade to be moved forward, so
6 that you can get it into hard-to-reach areas.

7 JUDGE KERINS: Do we have any guidance as to what
8 "optimally minimized" is?

9 MR. CAHILL: We don't have a quantitative definition. We
10 just have the example in the background of putting in the middle being a bad
11 idea.

12 And then we have the language in the specification about being
13 optimally minimized, pointing to the figures. And I have those figures on
14 the top of the tear sheet for the thin blade guard argument, that shows the
15 thin blade guard 58 ahead of the blade 60.

16 And you can see that it's pushed forward. Now it can't go all
17 the way forward, because you do need a guard, and you do need a gap
18 between the guard and the blade.

19 But optimally minimizing means you make those things as thin
20 as you can reasonably make them, so that the blade comes forward, and you
21 can shave in a corner.

22 But there is no quantitative definition.

23 Have we exhausted the questions on the blade guard?

24 JUDGE BAHR: I think so.

25 JUDGE KERINS: Yes.

26 MR. CAHILL: Okay.

27 So next is the angle of the working planes.

28 Now we all agree that Rozenkranc's configuration is different.
29 I've tried to put on the tear sheet the figures that I think best illustrate the
30 difference.

31 So on the Figure 1 of Rozenkranc, we have put some thick lines
32 in there that correspond to the working planes. And I'm not sure exactly

1 what the angle is on Rozenkranc. It looks like it's more than 45. I think it's
2 less than 60. It's somewhere in that range.

3 Not that I believe you can take this drawing and extract from it
4 exact dimensions. The drawing is not made to scale, at least not according
5 to Rozenkranc.

6 JUDGE KERINS: Counsel, on that point, Rozenkranc does
7 discuss angles in the specification. Correct?

8 MR. CAHILL: He discusses angles.

9 JUDGE KERINS: And in the drawing he actually
10 shows -- again we're not talking about your working planes, but we're
11 talking about the angle between the blades.

12 (Simultaneous conversation.)

13 MR. CAHILL: The orientation. Yes.

14 JUDGE KERINS: He draws lines showing that they're forming
15 a particular angle between them as evidenced by he draws the arc, showing
16 that there is to be an angle there.

17 MR. CAHILL: Yes.

18 JUDGE KERINS: Why can't we take from that that we can use
19 that drawing fairly for particular angles? Isn't that indicative that it's drawn
20 to show the preferred embodiment?

21 MR. CAHILL: Well, it is drawn to show the preferred
22 embodiment. And it does appear to indicate that angle.

23 So Rosenkranc is concerned with the angle between the blades,
24 and he prefers it to be 85 to 95 degrees. And this angle looks like it's about
25 90 degrees.

26 So he does in this figure fairly represent that angle.

27 Now he doesn't address any of the other angles.

28 JUDGE KERINS: Doesn't he address that the angles of the
29 blades relative to the working planes should be pretty much the same on the
30 two faces of the razor?

31 MR. CAHILL: He says they can be any suitable angle.

1 JUDGE KERINS: Doesn't he say that the one on the trim blade
2 should be similar to the one on the broad shaving blade?

3 MR. CAHILL: I don't recall him saying that. We can look
4 back at it. I think he might have said something along the lines of: "As with
5 the other blades, the trim blade can be at any suitable angle."

6 Now what we know about suitable angles doesn't actually come
7 from Rozenkranc. The other reference cited by the Examiner, Gerasimov, is
8 very interested in the angle between the blade and the working plane.

9 And he says that typical angles are 20 to 25 degrees.

10 If you work within that typical range, even if you blow up
11 Rozenkranc's blade angle to 120 degrees -- which he says it could be up to
12 120 degrees -- if the angle between the blade and the plane is 25 degrees, if
13 it's the same for both, then the angle between the working planes is still only
14 70 degrees.

15 It's still outside the range.

16 JUDGE KERINS: I'm not sure I'm following that. Can you --

17 MR. CAHILL: Well, if the angle between the blades were to be
18 120 degrees, and then the blades were to be angled 25 degrees with respect
19 to the working planes, you'd take off 25 degrees from the angle on one side,
20 and 25 degrees from the angle on the other side.

21 And then you would wind up with 120 minus 50. The angle
22 between the working planes would be 70 degrees.

23 JUDGE KERINS: Right. But the Examiner's not relying on
24 Gerasimov for that disclosure of 25 degrees being the angle.

25 MR. CAHILL: He's not relying on any disclosure.

26 JUDGE KERINS: Correct.

27 MR. CAHILL: Right. I point to Gerasimov because that's the
28 disclosure that's in the record. It's the only one we have, actually, that says:
29 What should the angle between the blade and the plane be?

30 I don't know what that angle is in Rozenkranc, or what angle he
31 prefers. They do -- if you just look at them, they appear to be a little bit
32 different. I'm not sure what the angles are.

1 The broad shaving plane looks like it might be 25, it might be
2 more. The trim blade looks like it would be a little less.

3 But we don't have any teaching from Rozenkranc as to what
4 they should be, or what angle they should be. And there actually isn't any
5 teaching on what the angle of the trim blade should be.

6 I mean, one might imagine --

7 JUDGE KERINS: Counsel, I did find in Rozenkranc, it does
8 say that "The trim blade is located at an adequate angle, enabling a good trim
9 similar to the angle at which the shaving blades are located when the shaving
10 is performed."

11 So it's saying that the angle of the trim blade should be similar
12 to the angle of the shaving blades.

13 MR. CAHILL: Okay. So that still doesn't get you to working
14 planes within Mr. Macove's range. It just says that those two angles ought to
15 be about the same.

16 JUDGE KERINS: Right. But that, combined with what is
17 illustrated in Figure 1 -- and if we were to take the angle of the blades out
18 another 30 degrees, as the Examiner has posited, doesn't that then put our
19 working planes within your range?

20 MR. CAHILL: Where does it put the working planes? I don't
21 know the answer to that.

22 JUDGE KERINS: I thought I recalled seeing that there was
23 discussion that the angle actually shown is about 60 degrees, the angle of the
24 working planes.

25 MR. CAHILL: It looks like it's a little less than that. But I
26 think the Examiner estimated it --

27 JUDGE KERINS: Then adding 30 degrees to that would then
28 put it somewhere close to 90.

29 MR. CAHILL: If you were to add 30 degrees to the angle
30 between the working planes shown in Rosenkranc, I believe it would be
31 within the 75-plus range that's claimed, okay, if you were to add 30 degrees
32 to it.

1 I don't think the various bits and pieces of Rozenkranc can be
2 added up that way. But yes, if you add 30 degrees to that angle, I believe it
3 would be in the range.

4 Now Rozenkranc prefers this much-smaller angle, because of
5 the way he designs his overall cartridge and handle combination.

6 All right. It's specifically designed so that when you flip it
7 over, basically there's a hinge there, and you rotate the cartridge for trim
8 blade shaving.

9 That's shown on page 10 of the brief.

10 JUDGE KERINS: It's not just simply moved up against a stop?

11 MR. CAHILL: Well, it is. There's a hinge. And the handle --

12 JUDGE KERINS: But the hinge is for the main shaving part to
13 be able to have a blade, have you be able to hold the handle in a particular
14 place and have the shaving blades rotate with the contour of the face.

15 MR. CAHILL: And then you have to flip it over, and basically
16 push it to the other stop --

17 JUDGE KERINS: Right --

18 MR. CAHILL: In order to use it for the trim blade. That
19 configuration is what drives the narrow angles in Rozenkranc.

20 So we view teaching that configuration as essentially teaching
21 away from our configuration with broader angles, that uses a different
22 handle.

23 And if you look to dependent claims, you'll see that there is a
24 different handle in there.

25 So in sum, it's our view that Rozenkranc presents a different
26 angle, that you can't add up the different bits and pieces of Rozenkranc to
27 build Mr. Macove's angle, and that it's clear why Rozenkranc prefers the
28 smaller angles that he disclosures in a facts-teaching way.

29 JUDGE BAHR: Any questions?

30 JUDGE KERINS: No.

31 JUDGE BARRETT: Nothing.

32 JUDGE BAHR: I think we understand your position.

1 MR. CAHILL: Okay.
2 JUDGE BAHR: Thank you very much for your presentation.
3 MR. CAHILL: And thank you very much.
4 (Whereupon, at approximately 9:42 a.m., the proceedings were
5 concluded.)

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